

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

SEP 20 2005

Federal Communications Commission
Office of Secretary

In the Matter of)

Annual Assessment of the Status of)
Competition in the Market for the)
Delivery of Video Programming)
_____)

DOCKET FILE COPY ORIGINAL
MB Docket No. 05-255

MOTION TO ACCEPT COMMENTS AS TIMELY FILED

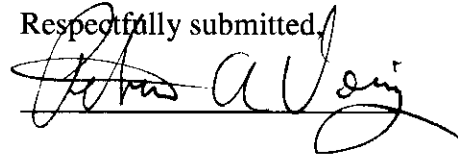
EchoStar Satellite L.L.C. respectfully requests the Commission to accept the attached Comments in response to the above captioned Notice of Inquiry as timely filed. On September 19, 2005, the Commission's Electronic Comments Filing System appeared not to be functioning properly, and counsel for EchoStar were unsuccessful in attempting to electronically file the Comments before the 12:00 am deadline. Two attorneys for EchoStar repeatedly attempted to file the Comments from two separate locations between 9:30 pm and 12:00 am to no avail.

No. of Copies rec'd
List A B C D E

0 & 4

In light of this technological obstacle preventing electronic filing of EchoStar's Comments before the deadline, EchoStar respectfully requests the Commission to grant this Motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Petra Vorwig', written over a horizontal line.

David K. Moskowitz
Executive Vice President
and General Counsel
EchoStar Satellite LLC
9601 S. Meridian Blvd.
Englewood, CO 80112

Pantelis Michalopoulos
Rhonda M. Bolton
Petra Vorwig
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-3000

Linda Kinney
Vice President -- Regulatory Affairs
EchoStar Satellite LLC
1233 20th Street, NW
Suite 701
Washington, DC 20036-2396

September 20, 2005

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
)

Annual Assessment of the Status of)
Competition in the Market for the)
Delivery of Video Programming)
_____)

MB Docket No. 05-255

COMMENTS OF ECHOSTAR SATELLITE L.L.C.

David K. Moskowitz
Executive Vice President
and General Counsel
EchoStar Satellite LLC
9601 S. Meridian Blvd.
Englewood, CO 80112

Pantelis Michalopoulos
Rhonda M. Bolton
Brendan Kasper
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-3000

Linda Kinney
Vice President -- Regulatory Affairs
EchoStar Satellite LLC
1233 20th Street, NW
Suite 701
Washington, DC 20036-2396

September 19, 2005

TABLE OF CONTENTS

Page

I.	INTRODUCTION AND SUMMARY	- 1 -
II.	COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING	- 3 -
A.	MVPD Access to Programming.....	- 3 -
1.	Denial of access or discriminatory access to Regional Sports Networks (“RSNs”) and affiliated national programming allows cable operators to hinder the ability of other MVPDs to compete and allows cable operators to continue charging consumers high prices.	- 3 -
2.	Cable operators exercise purchasing power over unaffiliated programmers to extract unduly preferential treatment.....	- 6 -
3.	Issues Associated with Access to Local Programming.....	- 8 -
a.	Tying retransmission consent of popular broadcast networks to carriage of unwanted cable networks.	- 8 -
b.	Anti-competitive restrictions in network affiliation agreements and other agreements between broadcasters threaten to siphon away the benefits intended by Congress when it enacted the Satellite Home Viewer Improvement Act (“SHVERA”)’s “significantly viewed” provisions.	- 9 -
B.	Effectiveness of the Commission’s Program Access Rules	- 10 -
III.	SPECIFIC DATA REQUESTED OF DBS SERVICE PROVIDERS	- 13 -
A.	Public Interest Programming	- 13 -
B.	Local-into-Local Service	- 14 -
C.	Programming, Equipment and Prices	- 15 -
D.	Advanced Services.....	- 16 -
E.	Information Regarding Retransmission of Digital Television Signals and the DTV Transition	- 18 -
IV.	CONCLUSION.....	- 21 -

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
)

Annual Assessment of the Status of)
Competition in the Market for the)
Delivery of Video Programming)
_____)

MB Docket No. 05-255

COMMENTS OF ECHOSTAR SATELLITE L.L.C.

EchoStar Satellite L.L.C. (“EchoStar”) hereby submits its Comments in response to the above-captioned Notice of Inquiry released by the Commission on August 12, 2005.¹ The Notice requests comments on the status of competition in the market for delivery of video programming. EchoStar is a Direct Broadcast Satellite (“DBS”) service providing hundreds of channels of digital programming to more than eleven million subscribers nationwide.

I. INTRODUCTION AND SUMMARY

Although DBS subscribership continues to grow as the Commission has observed, cable maintains its dominant competitive position in the market for multichannel video programming distribution (“MVPD”) services.² Thus, the goal of truly effective competition in the MVPD market has not yet been achieved. DBS operators’ viability and ability to effectively compete is of critical importance to the nation’s communications infrastructure, as DBS is uniquely situated to provide service during a homeland security or other crisis. The role of EchoStar and other satellite operators in

¹ *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, MB Docket No. 05-255 (rel. Aug. 12, 2005) (“Notice” or “NOI”).

² *See id.* at ¶ 43 (observing that cable continues to serve more than 70% of all MVPD subscribers despite the growth of DBS).

establishing or re-establishing service to areas devastated by Hurricane Katrina serves to highlight the importance of satellite MVPD service.³

One of the most significant ways in which cable has maintained its advantage in the MVPD market is through its ability to leverage its access to popular programming, whether affiliated or unaffiliated with cable. Cable's advantage is reflected by the fact that, as the Commission recognizes year after year, cable prices are increasing at a rate many times the inflation rate.⁴ Cable's runaway price hikes demonstrate that cable's competitors still do not discipline cable prices regardless of whether these competitors are experiencing healthy growth. The problems are compounded by the power of certain media conglomerates. This power continues to be used to force unwanted programming on MVPDs as part of the price for these conglomerates' must-have programming. EchoStar therefore continues to urge the Commission to take actions that will strike at the source of the competitive imbalance that continues to exist in the MVPD market -- the purchasing power of cable companies and the power of large programming conglomerates to impose programming bundles on distributors. There are concrete measures at the Commission's disposal that would help alleviate the imbalance and give consumers better choices for video programming.

³ Specifically, for example, EchoStar established the Katrina Information Network, a channel that will be available free of charge to all subscribers during the hurricane recovery period, which provides viewers with access to a variety of information relating to the disaster including key telephone numbers, a survivor list to help victims find their loved ones, as well as other updates provided by hurricane relief agencies. EchoStar has also partnered with Clear Channel Communications, Inc. to transmit Clear Channel's Baton Rouge FM radio signals to New Orleans stations so that listeners in New Orleans can get up-to-date information about the disaster and relief efforts.

⁴ See, e.g., *id.* at ¶ 7 (observing that over the 1998-2004 period, the average price for the combined basic and cable programming service tiers increased at rate of more than triple the rate of increase in the Consumer Price Index) (citing *Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, 20 FCC Rcd. 2718, Attachment 4 (2005)).

II. COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING

The Commission's NOI seeks comment on a number of factors that affect competition in the market for the delivery of video programming and also asks for comment regarding the effects of statutes and regulations on these matters, including whether statutes or regulations "create an uneven playing field for the distribution of video programming."⁵ EchoStar addresses below some of the important factors that affect competition from its perspective, and its views as to legislative and regulatory change needed to reduce competitive barriers with respect to each of these factors.

A. MVPD Access to Programming

1. **Denial of access or discriminatory access to Regional Sports Networks ("RSNs") and affiliated national programming allows cable operators to hinder the ability of other MVPDs to compete and allows cable operators to continue charging consumers high prices.**

The Commission inquires as to the effect of vertical integration on MVPDs' ability to obtain programming and the attendant consequences for MVPD competition.⁶ The NOI further asks whether there are "certain 'must-have' programming services, or genres of service (e.g., movie, sports, or news channels) without which competitive video service providers may find themselves unable to compete effectively."⁷ The Commission has already recognized that RSNs constitute "must-have" programming for MVPDs in their respective regions. RSNs have exclusive rights to the live broadcasts of the most popular sports teams in their region, both professional and college.⁸ And a

⁵ *Id.* at ¶ 10.

⁶ *See id.* at ¶ 17.

⁷ NOI at ¶ 18.

⁸ In some cases, an RSN has exclusive rights to all live broadcasts; in other cases, it has exclusive rights to a significant number of games. For example -- Comcast SportsNet in Philadelphia

significant number of MVPD subscribers are avid sports fans who would select only an MVPD that is able to carry these live broadcasts. RSNs are therefore vitally important to an MVPD's service offering to subscribers in those regions. The must-have nature of RSNs was empirically shown by economic studies EchoStar submitted to the Commission in the News Corp.-DIRECTV merger proceeding that demonstrated a drop in EchoStar's penetration rates in Philadelphia and New York when EchoStar was denied carriage of the RSNs for those regions.⁹ These factors led the Commission to conclude in the News Corp. proceeding that regional sports programming constitutes a distinct market and that control of professional sports in a region confers market power.¹⁰

As EchoStar's experience in Philadelphia and New York demonstrates, cable operators have not hesitated to exercise this market power to withhold affiliated RSN programming from non-cable competitors, and the program access rules do not appear to function as much of a deterrent. While the program access rules constrain the ability of cable-affiliated programmers to withhold programming from or discriminate against non-cable MVPDs such as EchoStar, the rules are subject to the well-known "terrestrial loophole." Specifically, many of the prohibitions contained in the

has rights to most Philadelphia Phillies games. See Jeff Gelles, *Consumer Watch: The Spikes Are on the Other Foot*, Philly.com, Jul. 4, 2005, http://www.philly.com/mld/philly/business/columnists/jeff_gelles/12049845.htm.

⁹ See Ex Parte Letter of EchoStar Satellite Corporation, *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control*, MB Docket No. 03-124 (dated Dec. 15, 2003) ("EchoStar's News Corp. Merger Ex Parte") at 3-4; see also *In the Matter of: Implementation of the Cable Television Consumer Protection And Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd. 12124, 12139, n.107 (2002) ("Program Access Order") ("[I]t is apparent that DBS penetration in Philadelphia is well below the 18 percent national penetration rate.").

¹⁰ See *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control* 19 FCC Rcd. 473, 543 (2004), at ¶ 147 *et seq.* ("News Corp.-DIRECTV Order").

program access rules apply only to “satellite cable programming,” which is defined in terms of satellite delivery of such programming.¹¹ Thus, the program access rules’ prohibitions on discrimination and exclusive deals does not apply to terrestrially delivered programming.¹²

Moreover, cable-affiliated RSNs have pricing power both with respect to subscribers and other MVPDs, meaning that exclusive RSN deals and preferential pricing ultimately harms consumers. As EchoStar’s economic experts demonstrated during the News Corp.-DIRECTV merger, Comcast Corporation (“Comcast”) has been able to charge higher prices to subscribers in Philadelphia because of its exclusive coverage of Philadelphia Phillies, 76ers and Flyers games. For example, in Philadelphia, Comcast’s RSN foreclosure strategy has allowed it to charge between \$3.75 and \$7.47 more per month than would be expected (after controlling for a number of other variables).¹³ The actual or threatened denial of access to an RSN also enables the cable company owner to charge supra-competitive prices to EchoStar and other MVPDs when the cable company does opt to offer the RSN, thus raising the prices to the subscribers of EchoStar and other MVPDs.

Cable operators also refuse to grant non-discriminatory access to popular national programming that they control. In Demand, the largest video-on-demand service in the market, is a case in point. In Demand is owned by Comcast, Time Warner, Inc. (“Time Warner”) and Cox Communications, Inc. in percentages proportionate to these cable operators’ subscriber bases. Many MVPD subscribers now view In Demand as an essential part of a programming package because of

¹¹ See 47 U.S.C. §§ 548(i)(1), 605(d)(1).

¹² See *In the Matter of DIRECTV, Inc. v. Comcast Corp.; EchoStar Communications Corp. v. Comcast Corp.*, 15 FCC Rcd. 22802, 22807 ¶ 19 (2000); *In the Matter of RCN Telecom Services of New York, Inc. v. Cablevision Systems Corp.; Microwave Satellite Technologies, Inc. v. Cablevision Systems Corp.*, 16 FCC Rcd. 12048, 12053 ¶ 14 (2001).

¹³ *EchoStar’s News Corp. Merger Ex Parte* at 4.

the broader variety of movies available at any time of the day. In Demand also controls two twenty-four hour high definition (“HD”) programming channels, which are growing in popularity as consumers become aware of the attractions of HD service. While In Demand ostensibly makes its service available to other MVPDs, it touts itself as available “only on cable” and uses a pricing scheme that effectively makes the price of its service prohibitive for DBS providers but not cable operators. The discriminatory effect of In Demand’s pricing scheme prompted both EchoStar and DIRECTV to file program access complaints against In Demand which are currently pending before the Commission.¹⁴

2. Cable operators exercise purchasing power over unaffiliated programmers to extract unduly preferential treatment.

In addition to the market power they derive from vertical integration with programmers, cable multiple system operators (“MSOs”) have significant purchasing power in the programming market generally. In a 1995 article published in the *Federal Communications Bar Journal*, Professor David Waterman found that “both affiliated and unaffiliated networks reportedly charged lower rates to cable systems than to alternative MVPDs.”¹⁵ Professor Waterman suggested that the most likely explanation was that the larger MSOs have “monopsony power” (more accurately, “oligopsony power”) in the programming market while other MVPDs did not. Thus, the result, based on the empirical record examined by Professor Waterman, was that even programmers unaffiliated with cable

¹⁴ See *In the Matter of EchoStar Satellite L.L.C. v. In Demand, L.L.C.*, File No. CSR-6913-P (filed July 5, 2005); *In the Matter of DIRECTV, Inc. v. In Demand, L.L.C.*, File No. CSR-6901-C (filed June 29, 2005). A program access complaint was also filed by a third DBS competitor, Rainbow DBS Company LLC, but the complaint was withdrawn after Rainbow ceased operating. *In the Matter of Rainbow DBS Company LLC v. In Demand L.L.C.*, File No. CSR 6414-P (filed Oct. 8, 2004).

¹⁵ David Waterman, *Vertical Integration and Program Access in the Cable Television Industry*, 47 Fed. Comm. L.J. 511, 524 (1995).

were consistently giving cable a better deal (even after controlling for cost differences) than the deals given to non-cable MVPDs such as EchoStar.

EchoStar believes that this conclusion will be borne out if the Commission conducts a per-subscriber comparison of the programming costs of MSOs. While such a comparison is not entirely straightforward because the figures reported in the different MVPDs' securities disclosures may be underlain by different assumptions, EchoStar believes that the Commission has the necessary tools at its disposal to structure such a well-informed comparison. Any appreciable differences in per-subscriber programming costs would seem not to be due to discriminatory rates for affiliated programming (since such discrimination would be prohibited by the program access rules) nor to differentiated programming, since all MVPDs endeavor to obtain all must-have programming. EchoStar believes, therefore, that such a comparison would allow the inference that programming cost differentials are due to the exercise of purchasing power by the large MSOs. That power is compounded by a peculiarity of the MVPD market -- cable MSOs do *not* compete with one another because of the dearth of overbuilds. Because of this commonality of interests, the purchasing power of a large MSO, particularly Comcast, can be even greater than its share of MVPD households might suggest.

What is the Commission to do to remedy this competitive dysfunction? The program access rules *clearly* reach only programmers in which a cable operator has an attributable interest. There do remain, however, two significant tools at the Commission's disposal. First, it should use its conditioning authority to prevent undue discrimination (beyond volume discounts and the other factors considered legitimate by the program access rules) by large unaffiliated programmers at the expense of non-cable MVPDs. Second, it should gather information about this issue and make a report to

Congress, including a recommendation that the program access rules extend to unaffiliated programmers.

3. Issues Associated with Access to Local Programming.

a. Tying retransmission consent of popular broadcast networks to carriage of unwanted cable networks.

Tying retransmission consent of popular broadcast networks to carriage of unwanted cable networks continues to be a widespread practice, as EchoStar reported last year. Broadcast networks are part of media conglomerates that also own cable programming networks, and as the Commission found in the News Corp-DIRECTV merger proceeding, local broadcast programming is also a “must-have” part of an MVPD’s programming package.¹⁶ This has been shown empirically by the substantial spike in subscriber growth that DBS providers experienced when they were first permitted to provide local-into-local service.¹⁷ However, notwithstanding the statutory license for local retransmissions, carriage of local channels still requires the retransmission consent of the broadcaster. The broadcast networks have often leveraged their ability to withhold “must-have” broadcast programming, if only temporarily, to obtain carriage of affiliated cable programming.

Such tying practices are often in violation of the antitrust laws. Furthermore, in a recent order implementing Congress’s directive to establish a reciprocal good faith bargaining obligation on MVPDs during retransmission consent negotiations, the Commission recognized that

¹⁶ See *News Corp.-DIRECTV Order*, 19 FCC Rcd. at 565, ¶ 202.

¹⁷ See *id.*

attempts to tie that are in violation of the antitrust laws also violate broadcasters' "good faith" bargaining obligation in retransmission consent negotiations.¹⁸

But while the Commission's recognition of this fact is an important step in the right direction, there are significant evidentiary difficulties associated with trying to establish that an attempted tie violates the antitrust laws and thereby, the good faith bargaining requirement, because the Commission generally does not allow discovery in retransmission consent proceedings. Without access to discovery tools in the Commission's proceedings, complainants will be relegated to launching lengthy, multi-million dollar antitrust actions in court in order to obtain the evidence necessary to establish such violations. The Commission should remedy this problem by affirmatively providing for discovery in such proceedings, affording MVPDs a more effective and less costly means of redress against anti-competitive conduct.

b. Anti-competitive restrictions in network affiliation agreements and other agreements between broadcasters threaten to siphon away the benefits intended by Congress when it enacted the Satellite Home Viewer Improvement Act ("SHVERA")'s "significantly viewed" provisions.

While SHVERA attempted to level the competitive playing field between cable and satellite operators by extending to satellite operators the "significantly viewed" carriage rights long enjoyed by cable operators, network affiliation agreements and other agreements between broadcasters often contain anti-competitive contractual restrictions that threaten to siphon away the benefits Congress intended. For example, it is not uncommon for network affiliation agreements to include a restriction on a local station's ability to grant retransmission consent for carriage of its signal outside

¹⁸ *In the Matter of Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 Reciprocal Bargaining Obligation*, MB Docket No. 05-89, Report and Order, 20 FCC Rcd. 10339, at ¶15 (2005) ("*Reciprocal Bargaining Order*").

of its designated market. These restrictions are intended to protect other affiliates from “invasion” by a distant signal. However, this is essentially an agreement among the network and its affiliates to ensure that affiliates do not compete with each other for MVPD viewers.

Such contractual restrictions thwart Congressional intent that stations become available by satellite in communities where they are already “significantly viewed” over-the-air. Congress only intended that carriage of “significantly viewed” stations be subject to the retransmission consent of the station in question, and not the consent of any other party, including the network. Although the Commission has tacitly recognized that third party control of retransmission consent rights could be used to defeat Congressional intent to make significantly viewed signals available via satellite,¹⁹ the Commission should also clarify that the statutory right to grant retransmission consent is not transferable in any fashion to a third party, and that no third party may influence a broadcaster’s exercise of its retransmission rights.

B. Effectiveness of the Commission’s Program Access Rules

The NOI requests comment on the effectiveness of the Commission’s program access rules.²⁰ As the Commission observed in its 2002 decision to extend the statutory prohibition on certain exclusive video programming contracts, the terrestrial loophole is but one of the many difficulties facing distributors that are not affiliated with any programming networks. Notwithstanding the growth of non-cable MVPDs in the years since the program access statute was enacted, “access to vertically integrated programming continues to be necessary in order for competitive MVPDs to remain viable in

¹⁹ See *id.*, 20 FCC Rcd. 10339, at ¶35 (“[The Commission] believe[s] that it is incumbent upon on broadcasters subject to such contractual limitations that have been engaged by an out-of-market MVPD to negotiate retransmission consent of its signal to at least inquire with its network whether the network would waive the limitation with respect to the MVPD in question.”).

²⁰ NOI, ¶ 19.

the marketplace.”²¹ Yet, as the Commission found in 2002, “vertically integrated programmers generally retain the incentive and ability to favor their cable affiliates over nonaffiliated . . . MVPDs to such a degree that, in the absence of the prohibition [on exclusive agreements], competition and diversity in the distribution of video programming would not be preserved and protected.”²² These findings remain as true today as they were three years ago.

The Commission’s decision in 2002 to extend the exclusivity ban was a step in the right direction. However, the Commission continues to falter where vigilant enforcement of the program access requirements is concerned. For example, while the Commission has stated that it has the power to police attempts to evade the program access rules by means of the terrestrial delivery of programming,²³ to date it has not done so. Cable companies thus can migrate programming from satellite to terrestrial service in order to obtain the power to deny access. The result is situations such as that in Philadelphia, where Comcast has exploited the terrestrial loophole to withhold its Comcast SportsNet RSN programming from its principal non-cable competitors, EchoStar and DIRECTV, hampering the latter’s ability to compete.

EchoStar believes that many cable-affiliated programmers continue to be emboldened by the Commission’s reluctance to reach the merits or decide the facts of program access disputes. For example, cable-affiliated RSNs are engaging in creative methods of “hidden discrimination” -- circumventing the program access rules by offering ostensibly non-discriminatory terms that

²¹ *Program Access Order*, 17 FCC Rcd. at 12125, ¶ 4.

²² *Id.* at ¶ 3.

²³ See *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, CS Docket No. 97-248, Report And Order, 13 FCC Rcd. 15822, at ¶ 71 (1998).

nevertheless effectively discriminate against their DBS rivals. They can, for instance, simply increase the price to all distributors across-the-board. This would increase their DBS rivals' costs, but would only mean an intra-company transfer between the cable operator and the affiliated programmer.

In addition, cable operators create arrangements to pay for affiliated programming based on a more narrowly targeted number of intended subscribers than satellite carriers. This is, in effect, the type of scheme that led EchoStar and DIRECTV to file program access complaints against In Demand concerning that programmer's effective discrimination at the satellite carriers' expense.

Indeed, in some cases, satellite carriers have to pay even for RSN subscribers in areas where the key sports programming must be blacked out. This means that, for a given number of subscribers interested in regional sports programming, a satellite carrier may have to pay a significantly higher amount than a cable operator, even though the subscriber fee may be nominally the same. DIRECTV has reported that Comcast demanded that it carry the Comcast SportsNet-West RSN (which actually features only one major professional basketball team -- the Sacramento Kings) to areas where such games could not be shown.²⁴ This extended carriage area meant that Comcast was charging more for CSN-West than what DIRECTV was paying for such top-ten cable networks as TBS, Nickelodeon, MTV, Lifetime, and Fox News Channel.²⁵

As a result of the lack of enforcement of the program access rules, EchoStar believes that there are still enormous discrepancies in the terms and conditions under which vertically integrated programmers make programming available to EchoStar and to cable operators, despite the significant growth in EchoStar's subscriber base. These discrepancies are not due to any legitimate competitive factors. Such anticompetitive conduct will continue to flourish, ultimately, to the

²⁴ See Comments of DIRECTV, Inc., *In the Matter of Adelphia Communications Corporation, Comcast Corporation and Time Warner, Inc.*, MB Docket No. 05-192 (dated July 21, 2005), at 23-25.

²⁵ *Id.* at 25.

detriment of consumers, unless the Commission begins to show a willingness to act. First, the Commission should utilize the power it admittedly already has to police evasion of the program access rules by means of terrestrial delivery, and it should also recommend that Congress eliminate the terrestrial loophole once and for all. Second, the Commission should recommend that Congress eliminate the sunset on the exclusivity provisions in program access rules. Third, the Commission should take advantage of the opportunity presented by the program access complaints pending against In Demand to make clear that effective discrimination violates the program access rules. And more generally, the Commission should also provide for discovery in its program access proceedings so that discrimination can be more easily identified. Discovery of correspondence and agreements between MSOs and affiliated programmers, among other material, for example, should be made routine in complaint proceedings alleging discrimination in favor of affiliated MSOs.

III. SPECIFIC DATA REQUESTED OF DBS SERVICE PROVIDERS

The NOI contains a number of requests for data concerning specific issues. EchoStar provides its responses to these requests below.

A. Public Interest Programming

The Commission requests information regarding the programming provided by DBS operators in compliance with their public interest obligations under Section 335 of the Communications Act.²⁶ EchoStar currently carries the following public interest channels: Brigham Young University (educational); Classic Arts Showcase (arts); Colours TV (multicultural programming); Free Speech TV (programming addressing social, political, and cultural issues); Good Samaritan Network (workplace learning); Hispanic Information & Telecommunications Network

²⁶ NOI at ¶ 14.

(Spanish educational, instructional and cultural programming); Worldlink TV (programming addressing cultural, political and humanitarian issues); Northern Arizona University (educational); Panhandle Area Education (educational); PBS YOU (educational); Research Channel (educational); RFD TV (news and information regarding rural issues); University of California (educational); and University of Washington (educational).

B. Local-into-Local Service

The NOI requests specific data pertaining to local service offerings pursuant to SHVIA.²⁷ EchoStar is pleased to provide the following data:

- 1. Number of Local Markets EchoStar Currently Serves:** 164; local markets are located in all 50 states and the District of Columbia
- 2. Number and affiliations of local stations carried by EchoStar**

ABC – 171
CBS – 171
NBC – 173
FOX – 169
PBS – 215
WB – 82
UPN – 79
Univision – 24
Telefutura – 14
Telemundo – 13
Azteca – 4
Ind – 36
PAX – 12
Daystar – 10
Independents – 88 (which includes stations airing ethnic, religious, Spanish and shopping programming)

- 3. Price of local programming packages (if a local channel package is purchased separately by the subscriber):**

²⁷ *Id.*, ¶ 46.

- \$ 5.99 where all 4 of the Big 4 affiliates (ABC, CBS, NBC and Fox) are offered
- \$ 4.99 where only 3 of the Big 4 are offered
- \$ 3.99 where only 2 of the Big 4 are offered

C. Programming, Equipment and Prices

The NOI requests data concerning DBS programming, equipment and prices.²⁸ The following data pertain to EchoStar's offerings:

1. Information on the number of channels and the monthly prices of various EchoStar programming packages --

EchoStar currently has five English language and three Spanish language packages, with the following channel counts and prices:

- America's Top 60: Over 60 channels including local channels for \$31.99
- America's Top 60 Plus: Over 60 channels, including local channels and regional sports network(s) for \$36.99
- America's Top 120: Over 120 channels including local channels for \$42.99
- America's Top 180: Over 180 channels including local channels for \$52.99
- America's Everything Pack: Includes America's Top 180 plus 30 premium channels for \$86.99
- DISH Latino: Over 30 channels with locals for \$29.99
- DISH Latino DOS: 120 channels plus locals for \$39.99
- DISH Latino MAX: Over 160 channels plus locals for \$49.99

2. Information on Foreign Language Programming packages --

EchoStar also offers a number of International programming packages, including ones in the following languages: African, Arabic, Armenian, Chinese, Farsi, French,

²⁸ *Id.* ¶ 48.

German, Greek, Israeli, Italian, Japanese, Korean, Polish, Portuguese, Russian, South Asian, Tagalog, Urdu.

D. Advanced Services

The Commission seeks information on the status of current and future plans by satellite operators to deploy high-speed Internet access.²⁹ Satellite broadband service represents one of the most promising hopes for expansion of broadband service to rural areas, which are in danger of being completely left out of the broadband revolution. Satellite systems are especially well-suited for the provision of broadband service to rural and other underserved areas because satellites can offer nationwide, ubiquitous service at prices that are distance insensitive, unlike cable and DSL. And notably, as is currently being demonstrated in the aftermath of Hurricane Katrina along the southern Gulf coast, satellite systems are uniquely capable of establishing or maintaining communications links when terrestrial services are destroyed or impaired during natural disasters or homeland security emergencies.

However, as EchoStar has reported in previous years, bandwidth constraints present an obstacle to satellite carriers' deployment of advanced, or "true broadband" services, defined by the Commission as those with transmission speeds greater than 200 kbps in each direction.³⁰ True broadband service is extremely spectrum intensive, and a lack of adequate spectrum contributed to making earlier satellite Internet access offerings uncompetitive, as they lacked a return link and were slower than DSL or cable modems.

²⁹ NOI at ¶ 50.

³⁰ See *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54 (rel. Mar. 17, 2004), ¶ 11. The Commission defines as "high-speed" services those with speeds exceeding 200 kbps in only one direction. See *id.*

EchoStar is currently engaged in several efforts to address some of the spectrum constraints that have hindered the development of satellite broadband. For example, as EchoStar discussed in its comments in last year's MVPD competition inquiry, EchoStar has urged the Commission to re-examine the allocation of spectrum blocks that currently lie unused as another potential resource for the provision of advanced satellite services to consumers. Specifically, EchoStar petitioned the Commission for a rulemaking to re-designate the 28.6-29.1 GHz and 18.8-19.3 GHz bands as spectrum that can be used both by geostationary satellite orbit ("GSO") and non-geostationary satellite orbit systems in the Fixed-Satellite Service on a co-primary basis.³¹ Lifting the domestic restriction on co-primary GSO usage of these bands would increase significantly the chance that the spectrum, which will otherwise lie fallow indefinitely, will be used to provide services benefiting the public interest. The block of spectrum above the DBS band, allocated to the Cable Television Relay Service ("CARS"), is another source of spectrum that can be used to deploy advanced services. The CARS band has been underused for years because of the migration of cable operators from CARS to fiber for transmitting programming to cable headends. The Commission has recognized the potential of the CARS band to serve other uses, determining in a 2002 order that the CARS spectrum could be utilized by other multichannel video programming distributors to augment their intermediate distribution links.³² Although this spectrum would be well-suited to a ubiquitously deployed consumer service, the Commission's 2002 order stopped short of allowing use of the CARS band in this manner, as had been proposed by EchoStar. The Commission did, however, indicate that

³¹ See Petition of EchoStar Satellite Corp. for Rulemaking to Designate the Non-Geostationary Fixed-Satellite Service Bands to Allow Geostationary Fixed-Satellite Service Operations on a Co-Primary Basis, RM No. 10767 (filed Aug. 27, 2003), placed on Public Notice in Report No. 2628 (dated Sept. 25, 2003).

³² See *In the Matter of Amendment of Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service*, Report and Order, 17 FCC Rcd. 9930 (2002).

it “intend[ed] to address in a separate proceeding” the question of using CARS spectrum for ubiquitously deployed consumer services.³³

Another year has gone by without the Commission initiating a proceeding regarding the CARS band. It also has not acted on EchoStar’s request to lift the domestic restriction on co-primary GSO usage. The Commission should act on these proposals in the very near future to help facilitate the availability of adequate spectrum resources for the deployment of true broadband via satellite.

In the meantime, even before additional spectrum is identified and made available, EchoStar continues to strive to provide consumers with alternatives to cable.³⁴ Through partnerships with telecommunications service providers, EchoStar currently offers a bundled service consisting of local and long distance voice service, high-speed Internet access (provided by using its partners’ DSL service), and multi-channel video programming.

E. Information Regarding Retransmission of Digital Television Signals and the DTV Transition

The NOI requests information regarding the rollout of HD programming to DBS subscribers.³⁵

1. Non-broadcast HD Programming

EchoStar currently offers an HD package that consists of five HD non-broadcast channels for \$9.99/mo. The following channels are included:

TNT HD
ESPN HD

³³ See *id.* at ¶ 44.

³⁴ See NOI, ¶ 26 (seeking details about advanced services being deployed by MVPDs, costs of such services, and advantages of various delivery technologies).

³⁵ NOI at ¶ 50.

Discovery HD Theater
HDNet
HDNet Movies

In addition, EchoStar offers the Voom HD package that consists of ten HD non-broadcast channels for \$5.00/mo. The following channels are included:

Ultra HD
Monsters HD
Rave HD
Equator HD
Gallery HD
Animania HD
Rush HD
HD News
Guy TV HD
Majestic HD

Further, for customers that subscribe to HBO The Works, HBO HD is included for no additional cost. Likewise, customers that subscribe to Showtime Unlimited receive Showtime HD for no additional cost. Finally, EchoStar offers one HD pay-per-view event channel that subscribers can access and pay-per-view for HD movies and special events.

2. Broadcast HD Channels

As a distributor of television programming, EchoStar has a stake in the nation's transition to digital television and the benefits the transition will bring to consumers. EchoStar is aiding the transition by incorporating an over-the-air DTV tuner in all HD boxes that EchoStar supplies to its HD customers. EchoStar has integrated the DTV tuner with the electronic program guide so that HD subscribers can seamlessly receive their local broadcasters' digital service off air. EchoStar also currently provides a distant CBS HD network feed to qualified subscribers. And EchoStar supported Congress's adoption of the so-called digital "white area" provisions of SHVERA, to allow satellite services to offer a distant HD signal to subscribers that are in areas unserved by a

local digital affiliate. Finally, EchoStar is investing heavily in the deployment of additional spot beam satellite capacity, advanced modulation (8PSK) and compression (MPEG-4) technologies to prepare for the dawning era of digital-only broadcasts.

As EchoStar has already cautioned the Commission, however, for the foreseeable future, universal HD station carriage in all 210 local television markets is technically and economically infeasible for DBS operators. EchoStar currently only has two spot beam DBS satellites that permit some reuse of scarce spectrum resources in different parts of the country. The addition of a new spot beam satellite and deployment of set-top boxes with 8PSK modulation will allow EchoStar to begin carrying some HD local service. And the eventual deployment of set-top boxes with MPEG-4 compression capabilities will further expand EchoStar's ability to squeeze more from its bandwidth and should further increase its ability to provide HD local service.

But the process of swapping out the set-top boxes of over eleven million subscribers across the nation, many with multiple boxes in their homes, is likely to require substantial effort, significant time, and an extraordinary investment of capital. Thus, even with a new spot beam satellite and widespread deployment of set-top boxes with advanced modulation and compression capabilities, EchoStar's ability to provide local channels in HD will remain limited.

As for a requirement of mandatory satellite carriage of HD or multicast DTV signals, the Commission and Congress should reject such demands from broadcasters.³⁶ Fundamentally, the imposition of such requirements on satellite operators is unlikely to pass constitutional muster both because of the additional burdens involved and because of the lack of a compelling government

³⁶ See *In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd. 4516 (2005) ("*Digital Signal Carriage Order*") (statement that Commission will consider satellite digital must-carry obligations separately).

interest.³⁷ To avoid such unconstitutional and unduly burdensome requirements, the Commission should clarify that downconversion of broadcast HD signals is not “material degradation” for purposes of the satellite must-carry requirement.

IV. CONCLUSION

EchoStar urges the Commission to take the foregoing comments into account in its next annual report on the status of competition among MVPDs.

Respectfully submitted,

/s/

David K. Moskowitz
Executive Vice President
and General Counsel
EchoStar Satellite LLC
9601 S. Meridian Blvd.
Englewood, CO 80112

Pantelis Michalopoulos
Rhonda M. Bolton
Brendan Kasper
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-3000

Linda Kinney
Vice President -- Regulatory Affairs
EchoStar Satellite LLC
1233 20th Street, NW
Suite 701
Washington, DC 20036-2396

September 19, 2005

³⁷ See *id.* (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) and *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) in holding that a must-carry requirement must further an important or substantial government interest and the burden imposed by the obligation must be congruent to the benefits obtained, and further, rejecting a requirement that cable operators carry dual or multicast signals).